

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 99-0548
RESPONSIBLE OFFICER
WITHHOLDING TAX
For Tax Periods: 1996-1997

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

ISSUES

1. Responsible Officer Liability – Duty to Remit Withholding Taxes

Authority: IC 6-8-3-4-8(f); Indiana Department of Revenue v. Safayan 654 N.E.2d 270 (Ind.1995).

Taxpayer disputes the determination that he had a duty to remit the corporation's withholding taxes.

.

Statement of Facts

The Indiana Department of Revenue timely assessed the corporate liabilities for withholding taxes unpaid to the state for the tax period 1996-1997. The corporation did not remit these taxes and the Indiana Department of Revenue assessed the liabilities against Taxpayer as a responsible officer of the corporation. Taxpayer protested this assessment and submitted documentation in lieu of a hearing. More facts will be provided as necessary.

1. Responsible Officer Liability – Duty to Remit Withholding Taxes

Discussion

The proposed withholding taxes were assessed against Taxpayer pursuant to IC 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest." The issue to be determined is whether or not Taxpayer was under a duty to remit the corporate withholding taxes to the state.

Pursuant to Indiana Department of Revenue v. Safayan 654 N.E. 2nd 279 (Ind.1995) at page 273: "The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. The factors considered to determine whether a person has such authority are the following:

1. The person's position within the power structure of the Corporation;
2. The authority of the officer as established by the Articles of Incorporation, By-laws or employment contract; and
3. Whether the person actually exercised control over the finances of the business including control of the bank account, signing checks and tax returns or determining when and in what order to pay creditors.

Id. At 273.

Taxpayer submitted an Affidavit, Consent of Directors to Action Without a Meeting, By-Laws of Sunrise Video Productions, Inc. and Articles of Incorporation of Sunrise Video Productions, Inc. These documents indicated that Taxpayer was a 49% shareholder of the corporation, an employee of the corporation and Vice-President of the corporation. As Vice-President, Taxpayer's sole duty was to act on behalf of the President when the President was absent or unable to act. Taxpayer never had to act in that capacity. According to the By-laws, the President and Treasurer had total authority for the corporation's financial matters. At no time did Taxpayer sign a check, draft, payment order or tax return on behalf of the corporation. These facts indicate that Taxpayer did not have the statutory duty to see that the withholding taxes were remitted to the Indiana Department of Revenue. Therefore, Taxpayer is not personally liable for the payment of these taxes.

Finding

Taxpayer's protest is sustained.